

DEC 19 1983

ALEXANDER L. STEVENS  
CLERK

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NO. 83-575

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

ROSE OLIVER, PHILLIP OLIVER  
NANCY OLIVER, EDWARD P. OLIVER  
ROSE MARIE BRENY AND RALPH BRENY  
Petitioners,

v.

LARRY J. MC CLURE  
PROSECUTOR OF THE COUNTY OF BERGEN  
STATE OF NEW JERSEY  
Respondent.

On Writ Of Certiorari To The Appellate  
Division Of The Superior Court,  
State Of New Jersey

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BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI

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LARRY J. MC CLURE  
Bergen County Prosecutor  
Attorney for Respondent

SUSAN W. SCIACCA  
Assistant Prosecutor  
Bergen County Prosecutor's Office  
Court House  
Hackensack, NJ 07601  
(201) 646-2300  
Counsel of Record

**QUESTION PRESENTED FOR REVIEW**

May a court order physical exemplars seized from non-defendant third parties based upon probable cause to believe that relevant evidence will be obtained?

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## OPINIONS BELOW

The following proceedings of the New Jersey State courts are reproduced in the appendix to the petition for writ of certiorari: the order of the New Jersey Supreme Court denying leave to appeal; the order of the Appellate Division of Superior Court, summarily reversing the order of the Law Division and directing Petitioners to submit to the taking of physical exemplars; and two letter decisions of the Law Division of Superior Court denying the State's motion to obtain said exemplars. None of these opinions are published.

Contained in the appendix to the present brief are: an order denying a stay, entered by Associate Justice William J. Brennan, Jr. on October 4, 1983 (Appendix A); an enforcement order entered by the Law Division on November 23, 1983 (Appendix B); and an order by

the Appellate Division granting an extension of time until December 9, 1983 for compliance with the enforcement order (Appendix C).

### JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on July 6, 1983 and the petition for writ of certiorari was thereafter filed within time. Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

### CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States,  
Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

#### STATEMENT OF THE CASE

On December 13, 1982, a Bergen County New Jersey Grand Jury indicted Edward F. Oliver for the September 7, 1981 murder of Deborah Ann Bell. The present Petitioners are all members of the defendant's immediate family. Each of these individuals, including the defendant, had access to a 1973 Ford Maverick belonging to Rose Oliver, defendant's mother. The facts which link

both the defendant and the motor vehicle to the murder of Miss Bell are crucial to an understanding of the present issue.

The murder victim's body was discovered wrapped in a green blanket with a large dark plastic garbage bag around her head. The bag and the blanket were secured with a yellow nylon rope. Subsequent investigation revealed that the yellow nylon rope matched rope used by a tree surgeon in performing work at the defendant's residence. The tree surgeon recalled seeing the defendant driving his mother's 1973 Ford Maverick and using dark plastic garbage bags to clean up debris on his property two days before the murder. A search conducted in defendant's home yielded a plastic garbage bag hidden in a hole in his closet ceiling. Laboratory analysis disclosed that this bag had been physically attached during manufacture to



the bag found over the victim's head, i.e., the two bags had been consecutively joined.

On the night of the murder victim's disappearance, neighbors had heard shrill female screams coming from the area of defendant's residence. Immediately after the screams, two neighbors saw a man and a woman in the defendant's yard. They heard a sound like a body being punched and heard the woman crying as she was being led into defendant's home.

Further investigation disclosed that the murder victim had given the defendant a substantial amount of money which he had refused to return. The defendant had stated prior to the murder that his friendship with the victim had been on "a collision course."

On the evening of the discovery of Deborah Bell's body, investigators from the Bergen County Prosecutor's Office

went to 31 Cogen Street, Saddle Brook, where the defendant resided with his mother Rose Oliver; his son, Edward Paul Oliver; and his brother and sister-in-law, Phillip and Nancy Oliver. The investigators secured consent from Rose Oliver to search her Ford Maverick. Human bloodstains were found on the trunk lid and on a raincoat contained inside the trunk, but blood grouping proved impossible. Sections of bloodstained carpeting removed from the trunk were determined to contain Type A blood, the same as the victim's. Subgrouping tests indicated that this blood type is shared by nine percent of the American public.

During the course of the search, the Maverick was vacuumed. Human hairs taken from the vacuum sweepings were compared against both the victim's hairs

and hair samples secured consensually from the defendant. The compared hairs were dissimilar.

In addition to the defendant and his mother, various other members of the Oliver family often drove the 1973 Maverick prior to the murder. Because of this, the prosecution sought to obtain blood and hair samples from all of these individuals. The State has contended throughout this litigation that the unidentified hairs will very likely be found to match those of persons who used the car innocently, and therefore would tend to prove that none other than the defendant used the car in the murder. With respect to the blood samples requested, the State has contended that the exclusion of the family members as possible sources of the blood from the trunk will bolster beyond doubt the inference that the blood was that of the

victim. Such blood analysis would require sub-typing, since at least two of the defendant's family members have testified that they share the victim's general blood type A.

Ruling on the State's request, the trial court found that the third party search was an unreasonable intrusion on the privacy rights of innocent persons, and denied the motion. On rehearing, the court was asked to reconsider its ruling based on a newly decided case, In re Morganthau, 188 N.J. Super. 303, 457 A.2d 472 (App. Div. 1983), certif. den. 93 N.J. 315, 460 A.2d 706 (1983). Again the court denied the State's motion, ruling that the blood and hair samples found in the motor vehicle have all been identified, and that the samples sought by the State are not "evidence of crime" for which a search warrant could issue.

The State appealed this ruling to the Appellate Division, which summarily reversed based on the Morganthau case. The New Jersey Supreme Court then denied the Petitioners' motion for leave to appeal. Following an unsuccessful attempt to obtain review in the United States District Court for the District of New Jersey, the family members filed the present Petition for a Writ of Certiorari and sought a stay of the state court judgement from Justice William Brennan, Jr. After Justice Brennan denied the stay, the State obtained an enforcement order directing the family members to supply the exemplars by November 30, 1983. Said order was modified by the Appellate Division to extend the deadline to December 9, 1983. The Petitioners then applied to the New Jersey Supreme

Court for a further stay, and the State agreed not to seek enforcement pending that decision.

### SUMMARY OF ARGUMENT

Third parties, wholly innocent of any criminal wrongdoing, may nonetheless be in possession of evidence sought in connection with a prosecution of another. When the evidence sought is corporeal, a court may order such individual to submit to the taking of physical exemplars based upon probable cause to believe relevant evidence will be uncovered. The court's order is the functional equivalent of a search warrant.

**ARGUMENT**

**PHYSICAL EXEMPLARS WERE PROPERLY ORDERED FROM THE PETITIONERS IN FULL ACCORDANCE WITH THE FOURTH AMENDMENT.**

Defendant Oliver's family members, the Petitioners herein, argue that physical exemplars sought as evidence in criminal cases may not be compelled from innocent third parties. They rely upon Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed. 2d 676 (1969) for the proposition that the prosecution must demonstrate probable cause to connect particular third parties to the actual commission of an offense in question before exemplars may be ordered from them. The State maintains that the family members have misconstrued the holding and import of Davis v. Mississippi. As was articulated in Zurcher v. Stanford Daily, 436 U.S. 547,

98 S.Ct. 1970, 56 L.Ed. 2d 525 (1978), upon which we rely, third party searches turn upon whether probable cause exists to believe that evidence will be found, and not whether the target of the search is also the target of the prosecution.

In the Zurcher case, the Santa Clara County District Attorney's Office obtained a warrant to search for film of a violent clash between student demonstrators and the police. The warrant was directed against the Stanford Daily, a student newspaper which had carried articles and photographs detailing the event. There was no allegation that any individual connected with the newspaper had engaged in any criminal act. Following the search, the newspaper sought declaratory and injunctive relief against the various law enforcement officers responsible for obtaining and executing the warrant.



When this controversy reached the United States Supreme Court, the issue presented was phrased thusly:

The issue here is how the Fourth Amendment is to be construed and applied to the "third party" search, the recurring situation where state authorities have probable cause to believe that fruits, instrumentalities, or other evidence of crime is located on identified property but do not then have probable cause to believe that the owner or possessor of the property is himself implicated in the crime that has occurred or is occurring. 436 U.S. at 553, 56 L.Ed. 2d at 534.

The Court resolved this controversy by finding that the language of the Fourth Amendment gives "no apparent basis. . . for . . . imposing the requirements for a valid arrest--probable cause to believe that the third party is implicated in the crime." 436 U.S. at 554, 56 L.Ed. 2d at 534. Instead, the probable cause standard focuses on the evidence and where it may be found. Thus, "[t]he critical element in a

reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." 436 U.S. at 556, 56 L.Ed. 2d at 535.

The underpinning for this doctrine is partially found in the simple proposition that the State's interest in uncovering evidence does not vary with the locale of the evidence. The further foundation rests on the historical separation of probable cause to arrest from probable cause to search. It is apparent that probable cause to search may require the issuance of a warrant on a complaint which does not identify any particular individual as the suspect. 436 U.S. at 555-556 and n.1, 56 L.Ed. 2d at 535-536.

Zurcher fully supports the order for third-party exemplars which the State of New Jersey seeks to enforce against the Oliver family. There is no factual dispute that these individuals all had frequent access to Rose Oliver's motor vehicle. Any one of them could be the source of the totally unidentified hairs; any one of them could have a blood subgrouping matching the stain on the trunk carpeting. The probable cause for the exemplar order is, simply, the connection of these family members to the car used in the murder, the existence of hair and blood inside this car, and the self-evident proposition that hair and blood can be shed in the ordinary course of human activity. These family members stand in the same position as the editors of the Stanford Daily in Zurcher: They

harbor evidence, and although they are not criminal suspects, neither are they supportive of the prosecution.

The only distinction between Zurcher and the present case is the nature of the evidence being sought. Quite clearly, if the State were presently seeking evidence such as the murder weapon, with probable cause to believe it was located upon the premises of an Oliver family member, Zurcher would routinely govern our application. There would be no question that the prosecution would not have to show probable cause to believe the family member was linked to the crime. For the following reasons, the State maintains that the present situation is identical analytically and must yield the identical result.

It is, of course, well settled that there is no distinction between the search for instrumentalities and fruits

of crime and the search for "mere evidence" of crime. As Warden v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L.Ed. 2d 782 (1967) explains:

The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for "mere evidence" or for fruits, instrumentalities or contraband. There must, of course, be a nexus--automatically provided in the case of fruits, instrumentalities or contraband--between the item to be seized and criminal behavior. Thus, in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required. 387 U.S. at 306-307, 18 L.Ed. 2d at 792.

The evidence sought by the State in the present case will, depending upon the results of laboratory analysis, explain the source(s) of the unidentified hairs and include or exclude the family members as sources of the bloodstain. It is obviously important for the State's case to be able to narrow down the source of

the blood to the murder victim, and to be able to show the jury that the hairs found in the car are innocuous. Such evidence would doubtless bolster our case against Edward Oliver.

It is true that the evidence the State seeks may point to the defendant's guilt by excluding others, rather than by directly implicating him. Such evidence remains relevant, for it continues to impact upon guilt and to prove a material fact. The use of forensic evidence in analyzing a crime scene is commonplace, both for what the laboratory results prove and disprove. Innocent third parties are routinely asked to provide corporeal samples, in aid of both the prosecution and the defense. People v. Browning, 166 Cal. Rptr. 292, 296, 108 Cal. App. 3d 117, 122-123 (Cal. App. 1980). Such evidence "includes" or "excludes" depending upon circumstances,

and proof by inclusion is acceptable.  
United States v. Dionisio, 410 U.S. 1,  
12-13 & n. 12, 93 S.Ct. 764, 771, 35  
L.Ed. 2d 67 (1973).

Despite the fact that the evidence which is being sought is corporeal, the order for its production must be considered the functional equivalent of a search warrant. The State agrees that obtaining blood and hair will involve a search of the persons of the family members and must be judged by Fourth Amendment standards. Search warrants are required to search for evidence in dwellings and are no less required when the intrusion is into the human body. Schmerber v. California, 384 U.S. 757, 766-770, 86 S.Ct. 1826, 16 L.Ed. 2d 908, 917-919 (1966) [test for alcohol in blood]; See also, Cupp v. Murphy, 412

U.S. 291, 294-296, 93 S.Ct. 2000,  
2003-04, 36 L.Ed. 2d 900, 904-906 (1973)  
[removal of fingernail scrapings].

The family members who contest the present search do not disagree that Fourth Amendment precepts govern the obtaining of exemplars. The difference between the position of the Petitioners and the State is that the Petitioners seek the same Fourth Amendment protection accorded to an accused even though they are not suspects. That is the fundamental problem with their reliance upon Davis v. Mississippi, supra.

In Davis, following the rape of an elderly lady, the Meridian Police took at least 24 black youths to headquarters where they were subjected to questioning and fingerprinting, in the total absence of probable cause to believe they were implicated in the crime. Each of these individuals was a potential suspect only



because the assailant had been described as a young black. When the fingerprints of one of these young men was found to match prints found on the victim's windowsill, he was arrested and ultimately convicted of the crime. On appeal, the United States Supreme Court reversed, finding that the Fourth Amendment had been violated by the investigatory seizure of the defendant. The Court condemned the "wholesale intrusions upon the personal security of our citizenry" which had subjected "unlimited numbers of innocent persons" to harassment and ignominy in violation of the Fourth Amendment. 394 U.S. at 726-727, 22 L.Ed. 2d at 680-681. On the other hand, the Court left open the possibility of permitting detention for fingerprinting "under narrowly defined

circumstances" in the absence of probable cause. 394 U.S. at 727, 22 L.Ed. 2d at 681.

Davis stands for the proposition that the police may not detain and search persons at will on the mere hope that one of them may prove to be the guilty party. Its holding pertains exclusively to those who could be suspects in an unsolved crime. It does not speak to third party searches, since every individual fingerprinted in Davis had been targeted for prosecution in the event his prints had matched those on the sill.

Research has disclosed few reported cases in which corporeal evidence was sought from non-suspect third parties. One such decision, In re Morgenthau, 188 N.J. Super. 303, 457 A.2d 472 (App. Div.), certif. den. 93 N.J. 315, 460 A.2d 706 (1983) is directly on point to the present case. In Morgenthau, the

Manhattan District Attorney sought blood, hair, and fingerprints from two relatives of an individual who was under indictment for four murders. These exemplars were necessary to identify various bloodstains and latent prints found in a van and a garage to which the relatives had access. The hair samples were necessary to try to match a hair found clutched in the hand of one victim. The van and the garage were crucial locales in the perpetration and concealment of the crimes: The victim found holding the hair had been abducted in the van; the van was repainted in the garage following the murders. 188 N.J. Super. at 305-307, 457 A.2d. at 473-474.

The New Jersey Appellate Division granted the exemplars sought by the Manhattan District Attorney. The Court reasoned that the State sought the "functional equivalent of a search

warrant," and that a search warrant could issue "in connection with evidence tending to show a violation of the penal laws of [New Jersey] or any other state." 188 N.J. Super. at 307, 457 A.2d at 475. Most crucial for present purposes, the court then relied upon Zurcher v. Stanford Daily for the proposition that it is constitutionally permissible to issue search warrants in connection with a prosecutor's application to obtain material evidence from third parties who are not suspects in a criminal prosecution." Id. The court concluded that, based on Zurcher, a non-culpable third party could be forced to give corporeal evidence, provided that these physical exemplars would constitute material evidence relevant to the defendant's guilt. The "minimal invasion" of the privacy interests of these individuals was outweighed by the

societal interest in an adequate prosecution. 188 N.J. Super. at 308-309, 457 A.2d at 475-476.

Morganthau makes the precise connection of legal theories urged by the State in the present matter. Given the fact that corporeal evidence may be obtained from a defendant in the Schmerber line of cases, and the further fact that third party premises may be searched pursuant to Zurcher, then it is a logically inevitable synthesis for a court to order third party physical exemplars. The simplicity of this proposition makes it evident that a grant of certiorari on the present petition is wholly unnecessary. The doctrine established by Morganthau and applied by the New Jersey courts herein is so well founded that it needs no further

scrutiny. Born of two well-established lines of cases, its lineage is impeccable.


The State urges that the petition for writ of certiorari be denied. We maintain that the court below applied well-settled principles of law and that there is no conflict or important legal issue for this Court to resolve.

#### CONCLUSION

For the reasons stated herein, a writ of certiorari should be denied.

Respectfully submitted,

LARRY J. MC CLURE  
Bergen County Prosecutor

  
BY: SUSAN W. SCIACCA  
Assistant Prosecutor  
Bergen County Prosecutor's Office  
Court House  
Hackensack, NJ 07601  
Counsel of Record

APPENDIX A  
SUPREME COURT OF THE UNITED STATES  
NO. A-232

ROSE OLIVER, ET AL.,

Applicants,

v.

LARRY J. MC CLURE,  
PROSECUTOR OF BERGEN COUNTY,  
NEW JERSEY

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O R D E R

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UPON FURTHER CONSIDERATION of the  
application of counsel for the applicants  
and the response filed thereto,

IT IS ORDERED that the temporary

2 a

stay entered on September 30, 1983, by  
the undersigned is vacated, and the  
application for stay is denied.

/s/ William J. Brennan, Jr.  
Associate Justice of the  
Supreme Court of the  
United States

Dated this 4th  
day of October, 1983



## APPENDIX B

LARRY J. MC CLURE  
BERGEN COUNTY PROSECUTOR  
COURT HOUSE  
HACKENSACK, NEW JERSEY 07601

SUPERIOR COURT OF NEW JERSEY  
BERGEN COUNTY-LAW DIVISION  
INDICTMENT NO. S-1131-82

THE STATE OF NEW JERSEY :  
-vs- :  
EDWARD OLIVER, :  
Defendant :

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This matter having come before the  
Court on the request of the Bergen County  
Prosecutor, First Assistant Prosecutor  
Dennis Calo appearing; and  
Rose Oliver, Edward Paul Oliver,  
Rosemarie Breny, Ralph Breny, Phillip  
Oliver and Nancy Oliver having been  
represented by Kevin G. Roe, Esq.;

IT IS ON THIS 23rd day of November,  
1983,

ORDERED that the individuals mentioned  
in this Order appear at the Bergen County  
Jail Annex at 11 a.m. Wednesday, November  
30, 1983 and at that time submit to the  
taking of hair and blood samples in a  
medically approved manner.

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JOHN J. CARIDDI, J.S.C.

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APPENDIX C

ORDER ON  
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO.  
MOTION NO.  
BEFORE PART G

GAULKIN  
COLEMAN

THE STATE OF NEW JERSEY,

v.

EDWARD OLIVER

MOVING PAPERS FILED	NOVEMBER 29, 1983
ANSWERING PAPERS FILED	NOVEMBER 29, 1983
DATE SUBMITTED TO COURT	NOVEMBER 29, 1983
DATE ARGUED	NOVEMBER 29, 1983
DATE DECIDED	NOVEMBER 29, 1983

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED  
TO THE COURT, IT IS HEREBY ORDERED AS  
FOLLOWS:

MOTION FOR STAY	GRANTED	DENIED	OTHER
PENDING			
DETERMINATION OF		X	X
PETITION FOR A			
WRIT OF CERTIORARI			

SUPPLEMENTAL:      The November 23, 1983

order requiring the individuals therein named to appear at the Bergen County Jail Annex at 11 a.m. Wednesday, November 30, 1983 to submit to the taking of hair and blood samples in a medically approved manner is amended to adjourn the date and time of such appearance to Friday, December 9, 1983 at 11 a.m.

The application for stay of the November 23, 1983 order as thus amended is denied.

FOR THE COURT

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GEOFFREY GAULKIN, J.A.D.

WITNESS, THE HONORABLE  
JUDGE OF PART G, SUPERIOR  
COURT OF NEW JERSEY,  
APPELLATE DIVISION, THIS  
29th DAY OF NOVEMBER, 1983.

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ELIZABETH MC LAUGHLIN  
Clerk of the Appellate Division